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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHARLES S. FOLTZ, *et al.*,
Petitioners,

v.

U.S. NEWS & WORLD REPORT, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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May 1, 1989

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QUESTIONS PRESENTED

From 1973 until 1984 over 70 percent of the outstanding stock of U.S. News & World Report, Inc. ("U.S. News") was held by its Profit Sharing Plan ("the Plan"), a defined contribution plan subject to the Employee Retirement Income Security Act of 1974 ("ERISA"). Each year, the Plan's fiduciaries used an appraisal of a minority stock interest in the corporation to calculate the "value" of the Plan's majority block of U.S. News stock. It is conceded that use of the minority stock price produced a result that was a fraction of the "fair market value" of the Plan's investment in U.S. News stock and that retiring participants received only a fraction of the benefits that would have been payable to them if the investment had been valued at its "fair market value". The court of appeals approved the undervaluations as consistent with the terms of the Plan and with one of its purposes, the preservation of employee ownership of U.S. News. The questions presented for review are as follows:

1. Did the fiduciaries' undervaluation of a plan's employer stock for the purpose of maintaining employee ownership violate the duty of loyalty and the obligation to apply plan assets for the exclusive purpose of providing benefits imposed by ERISA Section 404?

2. Did fiduciaries' use of a figure that was less than the fair market value of the plan's assets to calculate retirement benefits under a defined contribution plan violate the requirements of ERISA and the Internal Revenue Code that the value of the plan assets be annually determined and reported at "current" or "fair market value"?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioners were appellants in the United States Court of Appeals for the District of Columbia Circuit and plaintiffs in the United States District Court for the District of Columbia. Two separate actions in the district court were consolidated for trial and appeal.

1. *Foltz, et al.* v. *U.S. News & World Report, Inc., et al.* ("*Foltz*"), No. 84-0447 (D.D.C.) and No. 87-7151 (D.C. Cir.). The plaintiffs and class representatives in the district court, appellants in the court of appeals, and Petitioners here are:

Charles S. Foltz
Howard M. Handleman
Bem Price (currently by his estate)
M. Eugene Williamson
Richard J. Theobald
Nathan J. Margolin
Edward H. Castens
Robert deVogelaere

The certified class consists of 223 former employees of U.S. News & World Report, Inc. who separated or retired from the company between 1974 and 1981 and who sold their stock to the corporation or received benefits from the Profit-Sharing Plan.†

The defendants in district court in *Foltz* were:

U.S. News & World Report, Inc. (dissolved)
Madana Realty Co. (dissolved)

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† Until excluded by order of the district court, John Kirby was a member of the certified class in *Foltz*. He was an appellant in the court of appeals (No. 87-7152) and is a Petitioner here as well.

American Appraisal Associates, Inc.
John H. Sweet
Marvin L. Stone
William G. Dunn
Samuel J. Keker
Lester Tanzer
John J. Touhey
Raymond A. Naimoli
James H. McIlhenny
Joseph A. Acerno
Profit-Sharing Plan of
U.S. News & World Report, Inc.
Save-The-Fund (Intervenor)

The district court disallowed Plaintiffs' proposed amendment of the Complaint to add the following parties:

Mercantile-Safe Deposit & Trust Co.
Gretchen D. Langston
James Glassman
John W. Mashek
Neil C. Rice

2. *Richardson, et al.* v. *U.S. News & World Report, Inc., et al.*, ("*Richardson*"), No. 86-2195 (D.D.C.) and No. 87-7153 (D.C. Cir.). The plaintiffs in the district court and appellants in the court of appeals were:

David B. Richardson
Luther A. Dawson
Dorothy G. Haller
Joseph B. Le Compte, Jr.
George H. Mikesell
Richard P. Stifel
Martha B. Strube
Del Truitt

All of the foregoing, except Richard P. Stifel, join in this Petition.

The defendants in the district court in *Richardson* were:

U.S. News & World Report, Inc. (dissolved)
Profit-Sharing Plan of
U.S. News & World Report, Inc.
Mercantile-Safe Deposit & Trust Co.
Madana Realty Co. (dissolved)
American Appraisal Associates, Inc.
John H. Sweet
Marvin L. Stone
William G. Dunn
Samuel J. Keker
Lester Tanzer
John J. Touhey
Raymond A. Naimoli
James H. McIlhenny
Gretchen D. Langston
James Glassman
John W. Mashek
Neil C. Rice
Save-The-Fund (Intervenor)

3. Two supplemental civil actions were commenced in the district court. The plaintiffs in these actions, entitled *Foltz, et al. and Richardson, et al.* v. *Mortimer P. Zuckerman, et al.*, Supplemental Civil Action Nos. 89-0447 and 85-2195 (D.D.C.) ("*Zuckerman*") were the same as those listed above in the *Foltz* and *Richardson* actions. The defendants named in the supplemental proceedings were:

Mortimer B. Zuckerman
Fred Drasner

USNWR, Inc., formerly U.S. News
& World Report, Inc. ("U.S. News I")
Madana Realty Company
U.S. News & World Report, Inc.,
formerly U.S. News Management
Company ("U.S. News II")

All plaintiffs and the certified class in *Foltz*, the plaintiffs in *Richardson* and John Kirby were appellants in the court of appeals. All defendants named in *Foltz* and *Richardson* were appellees in the court of appeals with the exception of Joseph A. Acerno, Gretchen D. Langston, James Glassman, John W. Mashek and Neil C. Rice and Intervenor Save-The-Fund. Mercantile-Safe Deposit & Trust Co. was not allowed as a defendant in *Foltz* and claims against Mercantile are not at issue in this Petition although Mercantile's interests may be affected by the outcome of any review in this Court. The supplemental civil actions were severed and stayed pending outcome of underlying litigation. Supplemental defendants are not joined as respondents, and claims against those parties are not at issue in this Petition, although their interests may be affected by the outcome of any review in this Court.

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CHARLES S. FOLTZ, *et al.*,

Petitioners,

v.

U.S. NEWS & WORLD REPORT, INC., *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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Former employees of U.S. News and World Report, Inc. respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. The decision misinterprets and misapplies important provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") and trust law governing the administration of private pension plans. The fiduciaries undervalued a defined contribution plan's investment in a 70 percent interest in the plan sponsor. The court of appeals condoned the resulting underpayment of benefits to retirees because it found that the undervaluation was permitted by the terms of the plan and carried out for the asserted purpose of preserving employee ownership at U.S. News.

If undisturbed, the decision will encourage adoption of pension plans providing for arbitrary valuation of plan assets with a resulting underpayment of benefits to achieve extraneous corporate purposes—despite the express statutory commands that plan assets are to be held for the exclusive purpose of providing benefits and valued annually at fair market value. By diminishing the level of responsibility required of ERISA fiduciaries, this decision will adversely affect the administration of thousands of similar employee pension plans controlling billions of dollars in assets.

OPINIONS BELOW

The opinion of the court of appeals, reported at 865 F.2d 364, is included in Appendix A. The final opinion of the district court, reported at 663 F. Supp. 1494, is included in Appendix B. Unpublished orders of the court of appeals denying rehearing and the suggestion for rehearing en banc are included in Appendix C. Interlocutory orders and opinions are as follows (those in **bold typeface** are included in Appendix B)[1]; 106 F.R.D. 338 (D.D.C. November 20, 1984) (modifying class certification); 608 F. Supp. 1332 (D.D.C. March 28, 1985) (denying preliminary injunction); 760 F.2d 1300 (D.C. Cir. April 29, 1985) (vacating denial of preliminary injunction); 613 F. Supp. 634 (D.D.C. June 14, 1985) (granting preliminary injunction); 108 F.R.D. 57 (D.D.C. October 4, 1985) (ruling on proposed amendments to complaint); 623 F. Supp. 60 (D.D.C. November 26, 1985) (dismissing

[1] The remaining decisions are included in Volume I of the Joint Appendix, filed in the court of appeals. Citations herein to Volumes I-V(4) of that joint appendix are indicated as "(vol) JA (page)".

claims against trustee and current fiduciaries); 623 F. Supp. 350 (D.D.C. November 27, 1985) (dismissing claims against Mercantile Trust and Defendants Langston, Glassman, Mashek and Rice in *Richardson*); Order of November 27, 1985 (dismissing claims against Mercantile Trust and Defendants Langston, Glassman, Mashek and Rice in *Foltz*); **627 F. Supp. 1143 (D.D.C. January 15, 1986) (partial summary judgment in *Foltz*);** Order of January 23, 1986 (denying motion for reconsideration of court's November 27, 1985 order); Order of March 4, 1986 (dismissing certain claims in *Richardson*); Order of June 2, 1986 (excluding John Kirby from class); 639 F. Supp. 342 (D.D.C. June 12, 1986) (dismissing claims of Estate of Ben Grant); 111 F.R.D. 49 (D.D.C. June 26, 1986) (denying decertification of the Class); **639 F. Supp. 595 (D.D.C. July 7, 1986) (partial summary judgment in *Richardson*)**; Order of September 12, 1986 (allowing claims of certain *Richardson* plaintiffs under ERISA § 502(a)(3)); Order of January 12, 1987 (denying motion for leave to amend Complaint in *Foltz*); Order of January 12, 1987 (denying in part *Richardson* plaintiffs' Rule 15(b) motion); **Order of January 12, 1987 (dismissing claims against certain defendant directors);** Bench Ruling of January 12, 1987 (granting in part defendants' motions for judgment); 640 F. Supp. 1184 (D.D.C. August 7, 1986) (denying preliminary injunction in supplemental proceedings).

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1989. The orders denying rehearing and rehearing *en banc* were entered on March 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Issuance of the mandate has been stayed until May 1, 1989.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 403 of ERISA, 29 U.S.C. § 1103, requires that plan assets be held in trust for the exclusive purpose "of providing benefits to participants and their beneficiaries." Under Section 404 of ERISA, 29 U.S.C. § 1104, fiduciaries must act in the sole interest of participants and beneficiaries, for the exclusive purpose of providing benefits to them and must manage and administer plans with prudence and in accordance with the plan documents. Section 3(26), 29 U.S.C. § 1002(26), and Sections 103 and 104 of ERISA, 29 U.S.C. §§ 1023-1024, require the preparation and reporting of an annual report showing the "current value" of employee benefit plan assets and require the use of objective standards in the valuation of plan assets. Section 409 of ERISA, 29 U.S.C. § 1109, imposes liability upon fiduciaries who violate the duties imposed by Section 404. Section 502 of ERISA, 29 U.S.C. § 1132, authorizes participants and beneficiaries to maintain an action for payment of benefits due under the terms of a plan and for appropriate relief against fiduciaries breaching Section 404 duties. These statutory provisions, other relevant portions of ERISA and regulations thereunder are contained in Appendix D.

STATEMENT OF THE CASE

Until its sale in 1984, U.S. News & World Report, Inc. ("U.S. News") was an entirely employee-owned company. More than 70 percent of the stock was held in the company's Profit Sharing Plan (the "Plan"). All remaining stock was held by employees, who were required to tender their shares for redemption upon separation from U.S. News. Pursuant to the Certificate of Incorporation, the stock was to be valued annually by an independent appraiser to determine the option price for issuance and redemption of shares held by individual employees.

The Plan was a "defined contribution plan" in which each participant's interest was expressed as an individual account balance, periodically adjusted to reflect a proportionate share of the value of the Plan's assets.[2] The Plan provided that the value of U.S. News stock as determined under the Certificate of Incorporation was also to be used to value the U.S. News shares held by the Plan. The Plan's principal asset was its 50,000-share block of U.S. News stock.

Because the corporation redeemed employee stock and issued new shares annually, it had an independent appraiser determine the value of one share of its stock. The appraiser, American Appraisal Associates, Inc. ("American Appraisal"), expressly denied that it had ever valued the Plan's asset, an undivided 70 percent interest held as an undivided block of stock. Yet, the

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[2] In contrast to a "defined benefit plan," which specifies the amount of benefits due to a participant upon retirement, the amount of benefits payable under a "defined contribution plan" is determined by the participant's *pro rata* share of the value of the plan's assets.

Plan fiduciaries annually calculated the value of this asset by simply multiplying the "minority interest" stock price by 50,000. It is undisputed, and was recognized by the court of appeals and fiduciaries, that if the Plan's controlling block of U.S. News stock had been appraised at "fair market value," the value of the Plan's assets and the benefits paid to Petitioners would have been significantly higher.[3]

Both ERISA and applicable Internal Revenue Service ("IRS") interpretations required that the "fair market value" of the Plan's assets, including its investment in U.S. News stock, be annually determined and reported both to Plan participants and the Department of Labor ("DOL"). Each year, the plan fiduciaries filed with DOL the annual report required by ERISA, the Form 5500, stating that the "fair market value" of the Plan's investment in U.S. News stock had been determined by American Appraisal. These statements were false. American Appraisal was never asked to appraise the Plan's 50,000-share block of U.S. News stock, and it never performed any services for the Plan.

Petitioners in these consolidated cases are a certified class of 223 persons who retired or left U.S. News between 1974 and 1981, *Foltz, et al.*; seven persons who retired or left the company in 1982, *Richardson, et al.*; and a former director who retired in 1974 and

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[3] For 1978, the appraiser at the request of management, rendered both a "minority interest" and a "whole company" appraisal of the stock. The minority price—the one used to "value" the Plan's assets—was one-third to one-fifth of the estimated fair market value of the stock on a control or "whole company" basis. For other years the control value was up to 10 times greater than the minority price used.

was declared ineligible for class membership, *Kirby*. As members of the *Foltz* class retired or left U.S. News, their profit sharing benefits were determined on the basis of an average price of $100 per share for the Plan's U.S. News stock.[4] The *Richardson* petitioners' profit sharing benefits were calculated using a price of $470 per share for the U.S. News stock.

When U.S. News was sold to Mortimer Zuckerman in 1984, the agreed sales price was $176 million, or $2,842 per share. As a group, plan fiduciaries, former officers and directors, received $30 million of the sale proceeds through a combination of profit sharing and phantom stock interests. Parties to the proceeding included U.S. News, the Plan, officers, directors and plan fiduciaries, and American Appraisal. During the pendency of the litigation, the Plan has been enjoined from distributing to current participants $46 million in proceeds from the sale.

The trial court found that it was "not unreasonable" for the fiduciaries to have used a minority stock price to determine the "value" of the Plan's 70 percent interest in U.S. News. On appeal, a panel of the District of Columbia Circuit recognized that the fiduciaries' use of a minority valuation had produced an

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[4] For each of the years involved, the stock price used for calculation of Plan benefits was based upon an appraisal for issuance or redemption of individual shares rendered as of December 3lst of the preceding year. Thus, for those retiring in 1974, the 1973 stock price was used and so on. The prices were as follows: 1973 $80; 1974 $65; 1975 $65; 1976 $77; 1977 $95.25; 1978 $105; 1979 $125; 1980 $152; $1981 $470. (Although not involved in this petition, the appraised price for 1982 was $425 and for 1983 was $625.)

"immense gulf" between the pension benefits received by Petitioners and those paid to participants in 1984 when the company was sold. 865 F.2d at 367 (App.3a). However, it concluded that the undervaluation was both consistent with the terms of the plan documents and necessary for the maintenance of employee-ownership at U.S. News. Although the court observed that the Plan's U.S. News stock *could* have been appraised at its fair market value throughout the period, it reasoned that payment of benefits based on the fair market value of the Plan's assets would have created "liquidity problems" that would have jeopardized employee-ownership. 865 F.2d at 373 (App.16a).

The court of appeals also ruled that ERISA's requirement for the reporting of the "current value" of plan assets was not violated by the Plan's false statements that the "fair market value" of its U.S. News stock had been independently appraised, or by the Plan's use of a figure lower than the fair market value of its principal asset to calculate participants' account balances and retirement benefits. In the court's view, the Plan's U.S. News stock did not have to be valued at the price that it could have commanded on the open market because the Plan had "no intention" of selling its shares to outsiders. 865 F.2d at 372 (App.13a).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve an important issue of federal statutory law. In the 14 years since ERISA took effect, this is the first case to examine the interplay between the fiduciary duties imposed by ERISA and the requirement for annual valuation of pension and profit sharing plan assets. The court of appeals ruled that the conscious under-

valuation of a profit sharing plan's investment in the controlling block of stock of the plan sponsor did not violate ERISA. The court further held that the understatement of the value of the plan's assets, upon which benefits were calculated and paid, did not offend ERISA's requirement for an annual determination of the fair market value or "current value" of the plan's assets. The court of appeals' decision signals a complete misperception of the most basic of fiduciary duties—the duty to use trust assets for the exclusive purpose of providing benefits to participants and beneficiaries.

The acknowledged undervaluation of the principal asset of the profit sharing plan of U.S. News was carried out over a period of years for the asserted purpose of preserving employee ownership. The undervaluation might not been discovered at all were it not for the 1984 sale of the company, which exposed the "immense gulf" between the fair market value of the Plan's stock and the amount used to calculate Petitioners' benefits.[5] The court of appeals permitted a subjective factor, the Plan's intention not to sell its stock, to be used to depress the valuation of the Plan's controlling interest in U.S. News. Unless this Court makes it clear that plan assets are to be valued on an objective basis at fair market value, the decision in this case creates a substantial likelihood for mischief in plan asset valuations.

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[5] While the annual reports and the certified financial statements listing the value of a plan's assets are filed with DOL and circulated to participants, the Act does not require submission of appraisals of plan assets. In the case of U.S. News only Plan fiduciaries saw the appraisal reports.

There are approximately 638,000 defined contribution plans that are permitted to invest more than 10 percent of their assets in employer securities.[6] Unless objective valuation standards are confirmed and enforced in a manner consistent with the fiduciary obligations imposed by the statute, the valuation of employer securities may be manipulated and participants' retirement income sacrificed to foster other, equally laudable-sounding, corporate goals without substantial likelihood of detection. As of 1984, over $225 billion was invested in defined contribution plans; party-in-interest securities, represented some $53 billion of those assets.[7] The need for unbiased valuation is most critical for party-in-interest securities, particularly those that are not publicly traded. Unless participants are entitled to rely upon the integrity of the valuation process under ERISA, they will be unable to use the information reported to them to ascertain whether their fiduciaries are properly administering the plan and its assets.

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[6] Department of Labor, Pension and Welfare Benefits Administration, "Trends in Pensions," Table 1.3, Selected Plan and Participant Characteristics, 1975 and 1987. (To be published 1989).

[7] Department of Labor, Pension and Welfare Benefits Administration, Table 9, "Market Value of Assets and Liabilities of Private Pension Plans with 100 or more Participants by Type of Plan Entity, Type of Plan and Type of Asset or Liability, 1984" (Unpublished Statistics). For the same period such plans had only $36 billion invested in corporate stocks other than employer securities. *Id.*

I. ERISA'S REQUIREMENT THAT PLAN ASSETS BE HELD IN TRUST FOR THE EXCLUSIVE PURPOSE OF PROVIDING BENEFITS FORBIDS UNDERVALUATION OF PLAN ASSETS TO PRESERVE EMPLOYEE OWNERSHIP OF THE PLAN SPONSOR.

With barely a nod to the language and purpose of the statute, the court below undermined the strict fiduciary duties imposed by ERISA by ruling that a plan sponsor's interest in maintaining employee ownership overrides the fiduciary's duty to hold and manage plan assets for the exclusive purpose of providing benefits. The court interpreted the plan document to permit use of a minority price to value the Plan's investment in U.S. News stock, even though it represented a controlling interest in the company.[8] The court decided that the Plan was an integral part of the scheme of long-term employee ownership of U.S. News, and that so long as fiduciaries "expected to carry out the Plan's employee ownership purpose", they were not required to value its U.S. News stock at the price it would bring on the open market. 865 F.2d at 372 (App.13a). Although the court found "some irony in allowing plan fiduciaries—who here overlap largely with corporate management—to deny retiring employees the benefit of firm assets that *could have* been realized by management's pursuing a course of conduct that was clearly available", it nonetheless ap-

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[8] Under IRS regulations for valuation of stock interests in closely held corporations, one of the factors to be considered by the appraiser is the degree of control of the business represented by the size of the block of stock to be valued. Rev. Rul. 59-60, § 4.02(g), 1959-1 C.B. 237, 238-39. "[C]ontrol of a corporation, either actual or in effect, representing as it does an added element of value, may justify a higher value for a specific block of stock." (App.258a).

proved the use of a valuation method that directly decreased Petitioners' retirement benefits.[9] *Id.* (emphasis in original).

The court said that the fiduciaries had "no exclusive duty of maximizing pecuniary benefits," under Section 404 (*Id.* at 373, App.16a) and dismissed the underpayment of benefits to participants with the observation that where "the controlling documents contemplate employee ownership, all participants are *on notice* that maximization of the firm's pecuniary value is not to serve as an exclusive goal." *Id.* at 372 (App.14a) (emphasis added).[10]

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[9] One of the consequences of performing a minority valuation is that the value of the corporation's underlying assets is not "captured" in the stock price, on the rationale that a minority shareholder has no ability to control corporate decision-making needed to realize or exploit that value. In a control valuation, as the district court observed, "asset values loom large, for a sale of a controlling interest in a corporation allows the buyer to realize the value inherent in those assets." 663 F. Supp. at 1530 (App.92a). One of the largest tangible assets routinely ignored in the appraisal process was U.S. News' ownership of 3.8 acres in the "West End" of Washington, D.C. In each year the value of the land alone exceeded the aggregate minority value ascribed to the corporation.

[10] It is undisputed that a sacrifice without "notice" was exacted from all plan participants who retired or left the company prior to the 1984 sale. John Sweet, Chairman of the Board from 1973 to 1983, testified:

> "Q. Were the employees, in your view, Mr. Sweet, being asked to sacrifice any economic interest in order to maintain employee ownership?
> A. Yes, they were.
> Q. And was the economic interest that they were

The court discerned a congressional intention to "favor" a pattern of "long-term employee stock ownership"[11] from the fact that ERISA exempted employee stock ownership plans ("ESOPs") from the 10 percent limit on investment in employer securities. *Id.* at 373 (App.16a). In the court's view, "ERISA's evident approval of ESOPs precludes any claim that it forbids employee ownership as a legitimate plan purpose." *Id.* Although the court recognized that participants of the Plan at the time of sale received a "windfall," it saw no unfairness in Petitioners' having had their benefit calculations based on a fraction of the true value of the Plan's assets. The court reasoned that even if ERISA's Section 404 called for the exclusive pursuit of "pecuniary advantages" for plan beneficiaries, that goal was met because accumulated plan wealth, which had been withheld from Petitioners, was ultimately paid to *some* plan participants. *Id.* at 374 (App.16a-17a).

The lower court's laissez faire approach towards a disabling conflict of interest in the valuation of plan assets sets a dangerous precedent totally at odds with this Court's interpretation of ERISA and the strict

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being asked to sacrifice ever calculated for them?

A. No, sir.

Q. And was the choice as to the maintenance of employee ownership versus cashing in, if you will, ever presented to the employees to determine their views?

A. No, it was not." V(2) JA 2557.

[11] The U.S. News Plan was *not* an ESOP. In an ESOP participants have the option of receiving either cash or in-kind distributions from the plan at retirement. Such plans commonly pass through voting rights to participants. At U.S. News, the majority shareholder was the Plan itself.

duties imposed upon plan fiduciaries. The sole authority cited for the court's departure from ERISA's strict fiduciary obligations is its belief in an overriding, albeit completely undocumented, intention by Congress to favor employee ownership over proper valuation of employer securities.

The fiduciary obligations in ERISA are set forth in Section 404, which provides, in pertinent part:

> (1) [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries. . .[12]

The duty of loyalty is the most fundamental duty owed by the trustee to the beneficiaries of the trust. "This duty is imposed upon the trustee not because of any provision in the terms of the trust but because of the relationship which arises from the creation of the trust." 2 A. Scott, *The Law of Trusts* § 170 (1967).

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[12] 29 U.S.C. § 1104(a)(1)(A)(i). The remainder of that section provides that a fiduciary shall discharge his duties

"(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]." 29 U.S.C. § 1104(a)(1).

It is no less obligatory that this loyalty be directed for the exclusive purpose of providing benefits.

In *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981), this Court emphasized the high standard of loyalty demanded of ERISA fiduciaries. "Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties." *Id.* at 329.[13] The fiduciary requirements of ERISA were imposed to "specifically insulate the trust from the employer's interest." *Id.* at 333.[14]

Measured against these standards, the lower court's decision is a disturbing aberration. Every other circuit court of appeals that has had occasion to enforce ERISA's command that fiduciaries administer plans in the sole interest of participants and beneficiaries and for the exclusive purpose of providing benefits has emphatically condemned practices that subordinate interests of plan participants to those of a party-in-interest. Thus, in *Donovan* v. *Bierwirth*, 680 F.2d 263 (2d Cir. 1982), the court ruled that corporate officers and directors violated the duty of loyalty by using plan assets to buy employer stock to help management fend off a hostile tender offer. In *Leigh* v. *Engle*, 727 F.2d 113 (7th Cir. 1984), the Seventh Circuit made it clear that

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[13] Citing *Restatement (Second) of Trusts*, § 170(1) (1957); 2 A. Scott, *The Law of Trusts* § 170.

[14] The fact that trustees are permitted to also serve as officers, directors and employees of the plan sponsor under ERISA Section 408(c)(3) in no way limits "the duty of such a person to follow the law's fiduciary standards while he is performing his responsibilities as a trustee." 453 U.S. at 333 n.16. *McMahon* v. *McDowell*, 794 F.2d 100 (3d Cir. 1986) (Section 408 does not sanction any derogation of the strict requirements of Section 404.)

fiduciaries who had invested plan assets to enhance their control position in takeover targets would be liable for breach of ERISA's duty of loyalty, even though the challenged investments had produced a gain for the plan.[15] In *Deak* v. *Masters, Mates and Pilots Pension Plan*, 821 F.2d 572 (11th Cir. 1987), the court invalidated a plan amendment that suspended pension benefits longer for retirees who accepted jobs with non-union employers than for those who went to work for union employers, because the sole purpose of the amendment was to benefit the union.

The statute's requirement that plan assets be used for the *exclusive purpose* of providing benefits to participants and beneficiaries eliminates any doubt about how and toward what end the trustees' loyalties are to be directed in administering the trust. By specifying that trust assets be used for the sole purpose of providing benefits, Congress made it clear in Section 403 of ERISA that fiduciaries were to use trust funds only for payment of benefits and reasonable expenses of administering the plan,[16] and were not permitted to hold plan assets hostage to fulfill an extraneous purpose contained in the plan sponsor's articles of incorporation. The decision below erodes the protections inherent in the trust requirement by condoning fidu-

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[15] *Accord Amalgamated Clothing & Textile Workers Union* v. *Murdock*, 861 F.2d 1406 (9th Cir. 1988) (constructive trust will be impressed to deprive fiduciary of profits generated by use of plan funds to "greenmail" other companies).

[16] Section 403 provides: "[T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1).

ciary decisions that withheld from retiring participants the pecuniary advantage of the Plan's investment in U.S. News stock.

Although this Court has not had occasion to interpret this provision under ERISA, in *United Mine Workers Health and Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982), it did consider the analogous "sole and exclusive benefit" requirement in Section 302(c)(5) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 302(c)(5). The Court observed that Congress added the trust requirement to the LMRA to protect beneficiaries against the chance that union leaders look upon employee benefit funds as a union "war chest".[17] By the same token, Sections 403 and 404(a) were added to ERISA to make it impossible for fiduciaries and plan sponsors to divert employee trust funds for purposes other than those for which the plans had been created.[18] As this Court said in *Mas-*

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[17] 455 U.S. at 572 n.9. The Court quoted at length from the legislative history of the LMRA about the need to specify the purposes for which trust funds could be used. Senator Ball reasoned that controls were necessary to insure actual provision of benefits: "In other words, when the union has complete control of this fund, when there is no detailed provision in the agreement creating the fund respecting the benefits which are to go to employees, the union and its leadership will always come first in the administration of the fund, and the benefits to which the employees supposedly are entitled will come second." 93 Cong. Rec. 4753 (1947). *See also* S. Rep. No. 105, 80th Cong., 1st Sess., 52 (1947), 1 Leg. Hist. LMRA 458; 93 Cong. Rec. 3564 (1947); 93 Cong. Rec. 4678, 4746 (1947).

[18] "Employees have a right to expect that trustees and administrators will handle their pension funds properly for the purposes for which they are intended and will not neglect their duties in this regard or divert the funds to improper uses." III Legislative

sachusetts Mutual Life Insurance Co. v. *Russell*, 473 U.S. 134, 140-43 and n.8 (1985), one of the overriding goals of ERISA was to prevent misuse and mismanagement of plan assets by fiduciaries. There is no reason to suspect that ERISA's requirement for holding plan assets in trust for the exclusive purpose of providing benefits is any less stringent for corporate managers than that imposed to prevent abuses by union leaders under the LMRA.

Section 404(a)(2) of ERISA specifically provides that those administering plans permitted to invest in employer securities remain subject to *all* fiduciary obligations imposed by the statute except one—the duty to diversify investment of plan assets.[19] If Congress had intended in any way to permit fiduciaries to administer a plan's investment in employer securities in such a way as to *reduce* pecuniary benefits to participants, it would have clearly so stated.[20] The language

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History of the Employee Retirement Income Security Act of 1974, Committee Print, Conference Report at 4803. *See also* S. Rep. No. 93-127, 93d Cong., 1st. Sess. 30 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4866.

[19] Section 404(a)(2) provides: "In the case of an eligible individual account plan . . . the diversification requirement of paragraph (1)(C) and the prudence requirement (*only to the extent that it requires diversification*) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities. . ." 29 U.S.C. § 1104(a)(2) (emphasis added).

[20] As this Court observed in *Aaron* v. *SEC*, 446 U.S. 680, 697 (1980): "[I]t would take a very clear expression in the legislative history of congressional intent to the contrary to justify the conclusion that the statute does not mean what it so plainly seems to say." The court below did not cite *any* legislative history as support for its novel reading of Section 407(b)(1), and, indeed, there is none.

of the statute is the final embodiment of what Congress intended as the rule applicable to such fiduciaries. The lower court's divination of a congressional intent to "favor" employee ownership in Section 407(b)(1) cannot override the plain language of Section 404(a)(1) and (2).[21] Moreover, a concept of employee ownership—not directly but in trust—which withholds from participants the *monetary* advantage of the investment, eradicates the sole benefit that trust ownership was designed to provide.[22]

Two other circuit courts of appeal have expressly ruled that Section 407(b)(1)'s authorization to invest more than 10 percent of individual account plan assets in employer securities does not diminish fiduciary obligations under the statute, other than the duty to diversify investments.[23] A review of the legislative history of Section 407[24] convinced the Tenth Circuit in *Eaves* v. *Penn* that:

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[21] Section 401, 29 U.S.C. § 1101(a) provides that "this part [Fiduciary Responsibility] shall apply to any employee benefit plan described in Section 1003(a) of this title."

[22] ERISA defines an "employee pension plan" as a program established to provide "retirement income to employees" or which results in "deferral of income by employees for periods extending to the termination of covered employment." 29 U.S.C. § 1002(2)(A). A plan purpose that reduces retirement *income* to participants is antithetical to the concept of a pension plan.

[23] *Eaves* v. *Penn*, 587 F.2d 453 (10th Cir. 1978); *Donovan* v. *Cunningham*, 716 F.2d 1455 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984). *See also Fink* v. *National Sav. and Trust Co.*, 772 F.2d 4, 14 (D.C. Cir. 1985); *Burud* v. *Acme Elec. Co.*, 591 F. Supp. 238 (D. Alaska 1984).

[24] S. Rep. No. 93-127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4867 (exemption from

> The . . . legislative history, combined with a natural and clear reading of § 404, lead to the inexorable conclusion that ESOP fiduciaries are subject to the same fiduciary standards as any other fiduciary except to the extent that the standards require diversification of investments.

587 F.2d at 460. Likewise, in *Donovan* v. *Cunningham*, the Fifth Circuit ruled: "Congress was aware of and has struck a balance between, the competing policies [of fostering the formation of ESOPs and of safeguarding the interests of participants by rigorously enforcing fiduciary standards of responsibility]." 716 F.2d at 1467. Another panel of the District of Columbia Circuit, in *Fink* v. *National Savings and Trust Co.*, confirmed that despite its strong policy "favoring" investment in employer stock ERISA does not insulate fiduciaries from liability for continuing an investment of over 90 percent of a profit sharing plan's assets in employer securities after it was no longer prudent to do so. 772 F.2d at 955-56.

Not only is the court of appeals' conclusion at odds with the plain language of the statute, it also offends traditional trust principles, which have been expressly incorporated into ERISA to govern the administration of employee benefit plans. *Amax Coal*, 453 U.S. at 322, 332-34. "[R]ather than explicitly enumerating all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."

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prohibited transaction rules, and necessity for including specific listed transactions in which fiduciaries may engage), 4866 (purpose of § 404).

Central States Pension Fund v. *Central Transport, Inc.*, 472 U.S. 559, 570 (1985).

The lower court determined that the Plan's terms permitted the fiduciaries to select the method of valuing the Plan's assets that best served the preservation of employee ownership, irrespective of the effect on pecuniary benefits. As the court saw it: "Under ERISA the fiduciaries' duties are found largely in the terms of the plan itself." 865 F.2d at 373 (App.16a). This pronouncement demonstrates just how far the court has gone astray. The terms of a plan are governed by the specific requirements of the statute, and Section 404(a)(1)(D) provides that a fiduciary is required to administer a plan according to its terms only insofar as they are consistent with the statute. Under trust law, "[t]he extent of [a trustee's] duties and powers is determined by the trust instrument *and* the rules of law which are applicable, and not by his own interpretation of the instrument or his own belief as to the rules of law." *Restatement (Second) of Trusts* § 201 comment b (1957)(emphasis added).

The court of appeals dismissed the possibility that fiduciaries could have any possible liability to Petitioners because the value of the Plan's assets withheld from them was ultimately credited and paid to participants at the time of sale. "Indeed, the worst that can be said of the Plan is that it was administered to favor a rolling class of future beneficiaries over those present and past." 865 F.2d at 374 (App.17a). A trustee administering a trust in which there are two or more beneficiaries entitled to interests in the trust property is under a duty to deal impartially with them. *Restatement (Second) of Trusts* § 183. Where a trust "is created for beneficiaries in succession, the trustee is

under a duty to the successive beneficiaries to act with due regard to their respective interests." *Id.* at § 232. The administration of the Plan penalized participants who left between 1974 and 1982 and *favored* those still employed in 1984. That scheme clearly violates the duty of impartiality.

The court of appeals' decision is in irreconcilable conflict with basic trust law and the obligations imposed upon fiduciaries of all employee benefit plans, *including* those permitted to invest in employer securities. Moreover, the court's conclusion that the Plan's terms authorized the fiduciaries to use a figure that was less than the fair market value of the Plan's assets for calculation of participants' account balances and payment of benefits, misinterprets and misapplies ERISA's requirements for valuation of plan assets.

II. ERISA'S REQUIREMENT FOR AN ANNUAL DETERMINATION OF THE CURRENT VALUE OF A PLAN'S ASSETS CALLS FOR AN OBJECTIVE ANALYSIS AT FAIR MARKET VALUE

In condoning the annual undervaluation of U.S. News stock, the court below misapplied ERISA's requirement for annual reporting of the value of plan assets. Section 103(a) of ERISA requires every employee benefit plan to prepare an annual report, which is to be filed with DOL and furnished to participants. 29 U.S.C. § 1023(a). For a defined contribution plan, the report must include a certified financial statement listing all assets (including party-in-interest investments) at "current value." 29 U.S.C. § 1023(b)(3)(C). The term "current value" is defined as

> [F]air market value where available and otherwise the fair value as determined in good faith by a trustee or named fiduciary . . . pur-

> suant to the terms of a plan and in accordance with regulations of the Secretary, assuming an orderly liquidation at the time of such determination.

29 U.S.C. § 1002(26).

Although the definition of "current value" speaks of "fair market value where available" or "fair value as determined . . . pursuant to the terms of a plan . . . assuming an orderly liquidation at the time of such determination," the distinction relates only to the methods used to ascertain "fair market value" for different types of assets, *i.e.*, by reference to published market prices where available, or by appraisal in the case of a security for which there is no generally recognized market. The end result in each case must be the "fair market value." This is apparent from complementary IRS rulings on qualification of pension plans both before and after passage of ERISA. In Revenue Ruling 70-125, the IRS explained that a profit-sharing plan, to qualify for favorable tax treatment, must provide a formula for allocating plan contributions among participants and must

> provide for a valuation of investments held by the trust, at least once a year, on a specified inventory date, in accordance with a method consistently followed and uniformly applied. The *fair market value* on the inventory date is to be used for this purpose.

1970-1 C.B. 87 (App.259a) (emphasis added). This requirement was reaffirmed in Revenue Ruling 80-155, where the IRS reviewed plan qualification criteria in

light of the passage of ERISA. 1980-1 C.B. 84-85 (App.261a).[25]

The term "fair market value" has a widely accepted, settled meaning: "The price a willing buyer would pay a willing seller, neither under any compulsion and both having reasonable knowledge of the pertinent facts."[26] This definition has been adopted by courts as the standard for valuing assets in a variety of contexts.[27] Revenue Ruling 59-60, which sets forth criteria for valuing interests in closely held corporations for estate tax purposes, specifically adopts this accepted meaning. Stock appraisers routinely apply the factors outlined in Rev-

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[25] The U.S. News Plan was a qualified profit-sharing plan under the Internal Revenue Code. Thus, the court of appeals' interpretation that the Plan *directed* valuation of its assets at less than "fair market value" is in direct conflict with a continuing requirement for qualification throughout the period.

[26] The term "fair market value" is used throughout ERISA without definition. *See, e.g.*, 29 U.S.C. § 1082(c); 29 U.S.C. § 1107(A). Where Congress uses a term that has an accepted settled meaning it is presumed that Congress means to incorporate the established meaning of that term. *Amax Coal*, 453 U.S. at 329. It is a fundamental canon of statutory construction that unless otherwise defined words will be taken as having their ordinary, contemporary, common meaning. *Perrin* v. *United States*, 444 U.S. 37, 42 (1979).

[27] *See Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 474 (1973) (takings); *Sommers Drug Stores Co.* v. *Corrigan Enter., Inc.*, 793 F.2d 1456, 1461 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987) (ERISA); *Klapmeier* v. *Telecheck Int'l.*, 482 F.2d 247, 252 (8th Cir. 1973) (securities fraud); *Transwestern Pipeline Co.* v. *O'Brien*, 418 F.2d 15, 17 (5th Cir. 1969) (takings). The IRS and Pension Benefit Guaranty Corporation regulations define "fair market value" in precisely the same manner as the definition noted above. *Compare* 26 C.F.R. § 1.412(c)(2)-(1) (App.252a) *with* 29 C.F.R. § 2620.2 (App.254a).

enue Ruling 59-60 whether or not the appraisal is for the purpose of estate tax valuation.[28]

The definition of "current value" in Section 103(a) also establishes that the fiduciaries' determination of the "fair value" of an asset for which there is no generally recognized market must be made "in good faith."[29] Thus, there are two separate aspects of the question whether the "current value" of the Plan's 50,000-share block of U.S. News stock was properly ascertained: (1) Did the value ascribed to it reflect its fair market value; and (2) did the fiduciaries act in good faith in determining that value?

The court of appeals found that although the amount reported by the Plan to DOL and participants did *not* reflect fair market value, it was permissible under ERISA for *this* plan to provide for valuation of its investment in U.S. News stock at less than fair market value. The court found estate tax precedents inapplicable to the valuation of the Plan's assets, reasoning that estate tax cases dealt with actual transfers of a decedent's stock interests, whereas the Plan had no

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[28] *See generally* Comment, *Valuing Closely Held Stock: Control Premiums and Minority Discounts*, 31 Emory L.J. 1, nn. 2,3 (1982).

[29] Plan fiduciaries are prohibited from buying or selling party-in-interest securities unless "adequate consideration" is paid. Like "current value," the "adequate consideration" definition in ERISA has a fiduciary-conduct requirement. "The term 'adequate consideration' . . . means . . . in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset *as determined in good faith by the trustee or named fiduciary* pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary." 29 U.S.C. § 1002(18) (emphasis added).

intention of selling its U.S. News shares to outsiders. The court recognized that if the Plan's investment in U.S. News stock had been valued on the basis of a hypothetical sale, a majority valuation would have been required. However, it observed that since the Plan "by no means contemplated a liquidation" Section 103(b)'s "directive to 'assume an orderly liquidation' is to a degree inconsistent with the requirement of valuation 'pursuant to the terms of the plan.' " 865 F.2d at 375 (App.19a).

The court's manipulation of the fair market value standard completely undermines the integrity of the valuation process required under Section 103(b) of ERISA. The appropriate standard for determining fair market value under ERISA and in all other contexts is an *objective* one; it is completely irrelevant that the holder of the asset being appraised has no intention of parting with it. Not only did the Plan have the power to sell its asset throughout the period, it did precisely that in 1984. It is the power to make a sale that is relevant; the fact that one may not want or expect to sell is completely *ir*relevant in determining fair market value. *Estate of Curry* v. *United States*, 706 F.2d 1424, 1431 (7th Cir. 1983); *Estate of Bright* v. *United States*, 658 F.2d 999, 1007 (5th Cir. 1981) (en banc).[30] The court's application of Section 103(b) invites abuse of plan asset valuations by embracing the introduction of subjective factors into the valuation process.

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[30] The court below did not dispute that the Plan had the ability to sell its controlling interest at any time; it even noted "some irony" in allowing plan fiduciaries to deny Petitioners the true value of the Plan's stock, while reserving for themselves and the then current participants the amounts withheld from Petitioners. 865 F.2d 372 (App.13a).

The court reasoned that ERISA leaves the amount of benefits to be determined by the plan sponsor in creating the plan. Thus, the court said, nothing in the statute prevents a plan direction to value assets at less than fair market value because the valuation affects only the "level" of benefits to be paid to participants. This conclusion reflects the court's confusion between defined benefit plans, where the plan sponsor in creating the plan decides what level of benefits will be provided, and defined contribution plans, in which only the amount of the contribution is defined, and the benefits depend solely on the value of plan assets.[31] The court below relied for its reasoning on two cases involving defined benefit plans.[32] Broad statements about the effect of a defined benefit plan's terms on calculation of benefits cannot be blindly transferred to valuation of a defined contribution plan's assets in light of major differences in their operation.

Having recognized that there may have been some "deviation" between the "benefit calculation method"

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[31] In a defined contribution plan benefits are based solely upon each participant's account balance, which is a proportionate share of the plan's total assets, including any income, expenses and unrealized profits or losses. 29 U.S.C. § 1002(34).

[32] 865 F.2d 373 (App.16a). *See Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981) (ERISA's prohibition against forfeiture of vested benefit rights is not offended by plan term permitting offset of pension benefits by amount of workmen's compensation received); *Edwards* v. *Wilkes-Barre Publishing Co. Pension Trust*, 757 F.2d 52, 56-57 (3d Cir. 1985), *cert. denied*, 474 U.S. 843 (1986) (trustees' use of uncompensated strike time to calculate average annual compensation on which benefits were based was reasonable interpretation of plan).

under the Plan and the requirements of ERISA's Section 103(b), the court nonetheless excused that deviation. The court surmised: "Assuming the defendants' benefit calculation method deviates from that of § 103(b), we think such a deviation permissible so long as the fiduciaries have not concealed from the beneficiaries the critical facts that expose the possible deviation." 865 F.2d at 375 (App.19a). However, nothing in ERISA even remotely suggests that plan fiduciaries may deviate from the requirements of the statute so long as they have not concealed "critical facts" exposing the offense.[33]

The court of appeals recognized that multiplying a minority stock price by the 50,000 shares held by the Plan produced a result that was less than the "fair market value" of that asset. It removed the conflict between its interpretation of the Plan terms and the statute's requirements for fair market valuation by downplaying the significance of ERISA's reporting requirements: "We are far from clear that [the current value section] applies at all to benefit calculations." *Id.*[34] Disclosure of the true financial state of a plan is one of the most important substantive provisions of ER-

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[33] ERISA is directly to the contrary. Section 410 of the statute provides: "Any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation or duty under this part shall be void as against public policy." 29 U.S.C. § 1110(a).

[34] The term "current value" is used elsewhere in ERISA. *See, e.g.*, 29 U.S.C. §§ 1301(a)(17)(B), 1301(a)(18)(B), 1341(c)(2)(A)(ii)(I). These provisions relate to the calculation of a plan's termination liability. The fact that the term is used in another context utterly defeats the court's dismissal of current value as "only" a reporting requirement having no impact whatsoever on plan operation or benefits.

ISA. In a defined contribution plan the schedule of assets and the calculation of their "current value" serves to fix the total value of the trust assets to be apportioned among the account balances of all participants.

The court also misapplied Section 103(b)'s requirement of fiduciary "good faith" in determining the value of plan assets. It is undisputed that the Plan never obtained an appraisal of the fair market value of its principal asset. However, from 1975 through 1982, the Plan's annual report, as filed with DOL and distributed to participants, indicated that the "fair market value of the Plan's investment" in the control block of U.S. News stock had been appraised by American Appraisal. The appraisers denied that they ever calculated the fair market value of the Plan's 70 percent block of stock. Their sole assignment was to appraise a single share of stock. *See, e.g.*, V(3) JA 2655-56; 2935-37. The court found "[the] fiduciaries never recorded any deliberations and appear to have pursued the minority interest valuation more on the basis of inertia than explicit decisionmaking." 865 F.2d at 374 (App.18a).[35]

The court's misapplication of ERISA's reporting requirements virtually extinguishes the objective standards needed to insure the integrity of information provided under the statute's reporting and disclosure requirements. The integrity of the reporting process is

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[35] The plan fiduciaries never made any investigation of whether the valuation of the Plan's major asset was being properly done and never sought any advice on that score. V(1) JA 1836; V(2) JA 2281; 2375; V(3) JA 2883-84; 2893-95. This fact, coupled with the misrepresentations in the Plan's annual reports, is sufficient to preclude any finding of "good faith" on the part of the fiduciaries.

critical to the beneficiaries' ability to understand rights under the plan and to the government's ability to monitor a plan's compliance with ERISA.[36] The reporting and disclosure provisions were included in ERISA so that participants could *use* the information to enforce their substantive rights. The idea that reporting has nothing to do with benefit rights is preposterous. The Panel's statement that the "good faith" recording of *some* value is sufficient and its endorsement of the fiduciaries' "inertia" in obtaining that valuation impermissibly lightens the level of fiduciary duties imposed by the ERISA and trust law.

CONCLUSION

The court of appeals has eviscerated two of ERISA's principal provisions designed to protect plan participants against misuse of plan assets. The erroneous decision below relieves fiduciaries from accountability for their breach of the most basic obligation—the duty to insulate trust assets from the influence of the plan sponsor. If uncorrected, this decision will jeopardize the benefit rights of participants in thousands of plans. For the foregoing reasons, Petitioners pray that the Court grant a writ of certiorari and reverse the decision below.

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[36] 29 U.S.C. § 1001(b) provides: "It is hereby declared to be the policy of this Act to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information."

Respectfully submitted.

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